

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

SHIRLEY A. DESMOND, Individually
and as Personal Representative of the
Estate of WILLIAM J. DESMOND,
Deceased,

Plaintiff,

vs.

Case No. 2005-604-NI

KEVIN JOSEPH WALEWSKI and
CITY OF ROSEVILLE, Jointly and
Severally,

Defendants.

OPINION AND ORDER

Plaintiff, on behalf of her husband, has filed a motion for partial summary disposition with respect to defendant City of Roseville ("Roseville"), pursuant to MCR 2.116(C)(10). Defendants have filed a motion for partial summary disposition as to the gross negligence claim against defendant Kevin Walewski ("Walewski") under MCR 2.116(C)(7), (8), or (10). In response, plaintiff filed a counter-motion for partial summary disposition with respect to Walewski pursuant to MCR 2.116(C)(10).

I

This complaint was filed on February 14, 2005. Plaintiff claims that on July 24, 2004 her husband was involved in a motor vehicle collision with Walewski, an employee of Roseville. According to plaintiff, her husband's vehicle was rear-ended, on eastbound Twelve Mile Road, east of Fountain Road, in the City of Roseville, by a vehicle operated by Walewski and owned by Roseville. Due to the impact, plaintiff's husband suffered a closed fracture at C5-C7 with



central cord syndrome and was rendered a quadriplegic. On May 12, 2005 he died as a result of these injuries. Plaintiff was permitted to file a second amended complaint on December 12, 2005 seeking damages for wrongful death under MCL 600.2921 and MCL 600.2922 and now alleges count I for negligence against Walewski, count II for gross negligence against Walewski, and count III for respondeat superior against City of Roseville.

II

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of any one of several occurrences. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id.*

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608

NW2d 62 (2000). When reviewing such a motion, only the pleadings are considered; no documentary evidence may be examined. When deciding a motion under MCR 2.116(C)(8), the court must give the party an opportunity to amend unless the amendment would be futile. *Lane v KinderCare Learning Centers, Inc.*, 231 Mich App 689, 696; 588 NW2d 715 (1998).

A motion under MCR 2.116(C)(10) tests the factual support for a claim. In reviewing such a motion, the court will consider affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Smith v Globe Life Insurance Co.*, 460 Mich 446, 454; 597 NW2d 28 (1999). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is (1) no genuine issue in respect to any material fact and (2) the moving party is entitled to judgment as a matter of law. *Smith, supra*. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 446.

III

The Court will begin its review with plaintiff's motion for partial summary disposition with respect to Roseville. Plaintiff asserts Walewski is presumed negligent and there is no question of fact that Roseville, as the owner of the vehicle, is vicariously liable. Plaintiff states the presumption of negligence is rebuttable, but contends the sudden emergency doctrine is not applicable. Plaintiff argues deposition testimony demonstrates the circumstances of the incident were not unusual or unexpected, as required by the doctrine. In addition, plaintiff asserts Roseville failed to produce the vehicle or the sensing and diagnostic module ("SDM") and therefore negligence should be presumed.

Defendants respond that a factual dispute is demonstrated by the deposition testimony. Defendants argue the testimony establishes two separate accidents occurred, creating a sudden emergency. Additionally, defendants state that negligence is only presumed when evidence is not produced intentionally. Defendants claim plaintiff has not presented evidence of intentional destruction of the vehicle, therefore negligence can not be presumed.

MCL 257.402(a) states:

In any action, in any court in this state when it is shown by competent evidence, that a vehicle traveling in a certain direction, overtook and struck the rear end of another vehicle proceeding in the same direction, or lawfully standing upon any highway within this state, the driver or operator of such first mentioned vehicle shall be deemed prima facie guilty of negligence. This section shall apply, in appropriate cases, to the owner of such first mentioned vehicle and to the employer of its driver or operator.

This presumption is rebuttable with positive, unequivocal, strong, and credible evidence. *Lucas v Carson*, 38 Mich App 552, 556-557; 196 NW2d 819 (1972). The sudden emergency doctrine rebuts the presumption of negligence. *Vander Laan v Miedema* 385 Mich 226, 232; 188 NW2d 564 (1971). This doctrine requires the presence of unusual and unsuspected circumstances. *Id.* at 233. A circumstance is considered "unusual" when it varies "from the everyday traffic routine that confronts a motorist" and "unsuspected" when it appears "so suddenly that the normal expectations of due and ordinary care are modified." *Young v Flood*, 182 Mich App 538, 541; 452 NW2d 869 (1990).

In this case, the evidence presents a factual dispute as to whether the sudden emergency doctrine applies. Defendants offer deposition testimony to establish two separate accidents occurred creating a sudden emergency. According to Barbara Durecki, on July 24, 2004 she was forced to stop her vehicle on eastbound Twelve Mile Road, east of Fountain Road; in the City of Roseville due to a garbage can in the lane. See Exhibit A of Defendant's brief in support of

response to partial summary disposition, at 3-4. Durecki states a vehicle operated by Gail Watson rear-ended her vehicle, and as she exited her vehicle, she "heard a crash of metal." *Id.* at 4. In addition, deposition testimony of Rose Quinn, the passenger in Durecki's vehicle, established she heard a crash after their vehicle was rear-ended by Gail Watson. *See* Exhibit B of Defendant's brief in support of response to partial summary disposition, at 4. Walewski provided deposition testimony that he did not observe brake lights prior to the impact of plaintiff's vehicle. *See* Exhibit C of Defendant's brief in support of response to partial summary disposition, at 6-7. The affidavit of David Shepardson, an accident re-constructionist, maintains that a garbage can in the traffic lane presented an unusual and unexpected situation causing the initial collision between Durecki and Watson. *See* Exhibit E of Defendant's brief in support of response to partial summary disposition. Shepardson concludes this collision caused plaintiff to make an unexpected maneuver to avoid the accident that occurred in front of him, which forced Walewski to rear-end plaintiff's vehicle. *Id.*

This evidence is contradicted by deposition testimony of Gail Watson and her passenger Michael Watson, which indicates their vehicle was struck by plaintiff's vehicle, causing it to strike Durecki's vehicle. *See* Exhibit B and F of Plaintiff's brief in support of partial summary disposition. In addition, the affidavit of Larry Petersen, an automotive engineer specializing in accident reconstruction, asserts Walewski's vehicle was traveling in excess of the posted speed limit of 35 miles per hour. *See* Exhibit G of Plaintiff's brief in support of partial summary disposition. Petersen concludes Walewski's inability to stop his vehicle was due to the violation of the speed limit, which caused the chain reaction of collisions. Therefore, after examination of all the above evidence, the Court finds a factual dispute exists for the trier of fact regarding whether the presumption of negligence is rebutted by the sudden emergency doctrine.

The Court now turns to plaintiff's argument that defendants' failure to produce the vehicle creates an adverse presumption entitling plaintiff to summary disposition. When a party deliberately destroys or fails to produce evidence in their control, a presumption arises that the evidence, if produced, would operate against that party. *Johnson v Austin*, 406 Mich 420, 439; 280 NW2d 9 (1979). Missing evidence gives rise to an adverse presumption only when the complaining party demonstrates intentional conduct. *Ward v Consolidated Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005). An adverse inference of missing evidence can be rebutted by the party providing a reasonable explanation for its failure to produce the evidence. *Id.* at 86.

Here, plaintiff has failed to show defendants intentionally destroyed the vehicle. Deposition testimony of Darrell Harp, supervisor of the City of Roseville mechanics garage, demonstrates the vehicle involved in the collision was towed back to the Department of Public Works ("DPW") garage. *See* Exhibit A of Plaintiff's supplemental brief in support of motion for partial summary disposition. Harp testified that none of Roseville's employees inspected the vehicle except to remove the city radio equipment. *Id.* Deposition testimony of Carl Koehler, foreman for DPW, indicated a sticker was attached to the vehicle informing employees "not to touch it." *See* Exhibit F of Defendant's brief in support of response to partial summary disposition. The insurance company later removed the vehicle from the garage. Further, Koehler and Harp testified that Roseville never instructed their departments to do anything to the vehicle after the collision, including maintenance, removal of the SDM, or disposal of the vehicle. *Id.*; Exhibit A of Plaintiff's supplemental brief in support of motion for partial summary disposition. Thus, the Court finds there is no evidence of fraudulent intent concerning defendants' disposal of the vehicle, and an adverse presumption is not demonstrated which would warrant granting plaintiff's request for summary disposition on this basis.

This brings the Court to consider defendants' motion for partial summary disposition with regard to gross negligence of Walewski. In this motion, defendants assert plaintiff failed to demonstrate gross negligence on the part of Walewski. Defendants contend plaintiff's sole allegation (violation of the speed limit) does not amount to gross negligence. Defendants further claim deposition and expert testimony show Walewski was not the proximate cause of the collision. As a result, defendants argue there is no evidence of gross negligence so governmental immunity is applicable.

In response, plaintiff maintains the evidence supports the claim of gross negligence of Walewski. Furthermore, plaintiff counter-motions for partial summary disposition with regard to Walewski, arguing that any factual inconsistencies are minor and do not create a material factual dispute. Plaintiff asserts testimony establishes no sudden emergency existed, and the only cause of the incident was Walewski's excessive speed and inability to stop his vehicle.

Government employees are immune from tort liability for injury to a person or damage to property caused while in the course of employment. MCL 691.1407(2). The employee must act within the scope of employment, be engaged in a governmental function, and the conduct must not amount to gross negligence that is the proximate cause of the injury or damage. *Id.* Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Further, the phrase "the proximate cause", as provided in MCL 691.1407(2), means "the one most immediate, efficient, and direct cause preceding the injury." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

Here, the record demonstrates a factual dispute exists as to whether Walewski was grossly negligent. As previously discussed, a reasonable conclusion could be drawn from the deposition testimony of Quinn and Durecki, as well as the affidavit of David Shepardson, that a

sudden emergency occurred which caused Walewski to rear-end plaintiff's vehicle. If the trier of fact reaches this conclusion, Walewski then could not be "the proximate cause" of plaintiff's injuries, and gross negligence could not be established.

Alternatively, plaintiff has presented contradictory evidence indicating a sudden emergency did not occur. As discussed in depth *supra*, evidence that Walewski failed to stop within an assured clear distance, causing a chain reaction of collisions, is demonstrated by deposition testimony of Gail Watson, Michael Watson, the traffic crash report, and the affidavit of Larry Petersen. This evidence could lead to a reasonable conclusion that Walewski was grossly negligent. While plaintiff asserts this factual discrepancy is minor, the Court disagrees, finding a genuine issue of material fact exists with regard to whether Walewski was in fact grossly negligent.

For the same reasons the Court concludes defendants' motion for partial summary disposition is unwarranted, plaintiff's counter motion for partial summary disposition is also properly denied.

IV

Based on the foregoing, it is hereby

ORDERED plaintiff's motion for partial summary disposition with regard to defendant City of Roseville is DENIED. It is further

ORDERED defendants' motion for partial summary disposition as to the gross negligence claim against defendant Kevin Walewski is DENIED, and it is further

ORDERED plaintiff's counter-motion for partial summary disposition with regard to defendant Walewski is also DENIED.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

SO ORDERED.

DATED:

cc: Kurt Anselmi
Audrey Forbush

Peter J. Maceroni,
Circuit Judge

PETER J. MACERONI
CIRCUIT JUDGE

JUN - 8 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: *[Signature]* Court Clerk